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# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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No. 213

UNITED STATES OF AMERICA, PETITIONER,

vs.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**FILED JULY 7, 1955**

**CERTIORARI GRANTED OCTOBER 10, 1955**

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1 IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## Appendix to Appellant's Brief

United States District Court, Southern District of New York

Civ. 93-38

Basis of Action: Cancel certificate of naturalization

UNITED STATES OF AMERICA

vs.

ETTORE ZUCCA, also known as Mario Sarni, also known as Ettore Sarni Zucca

EXCERPTS FROM DOCKET ENTRIES

For Plaintiff:

U. S. ATTORNEY

For Defendant:

JUDD & GURFEIN, 655 Madison Ave. (21)

| Date | Filings—Proceedings |
|---|---|
| May 4-54. | Filed Complaint and Issued Summons. |
| May 11-54. | Filed summons and return. served deft. 5-7-54. |
| June 29-54. | Filed Stip. & Order extending time to answer to 8-2-54, Edelstein, *J.* |
| 2 July 20-54. | Filed Stip. & Order extending time to answer to 8-10-54. |
| Aug. 10-54. | Filed notice of motion to dismiss complaint, etc., ret. 8-24-54. |

* * * *

Nov. 17-54. Filed opinion #21,500 Complaint dismiss unless, etc. (see opinion) Settle order, Palmieri, *J.*

Dec. 6-54. Filed order dismissing complaint for failure to file affdvt. showing good cause for institution of present proceedings, and for reinstatement of complaint provided affdvt. of good cause be filed within 60 days, Palmieri, *J.* Mailed notice of entry 12-7-54

Feb. 4-55. Filed Notice of Appeal and on 2-8-55 mailed copy to Judd & Gurfein

Feb. 14-55. Filed order dismissing complaint without prejudice to Govt's right to institute action to denaturalize deft. upon filing affdvt. of good cause, Palmieri, *J.* Mailed notice of entry 2-15-55

Feb. 18-55. Filed Notice of Appeal and on 2-21-55 mailed copy to Judd & Gurfein

COMPLAINT FILED MAY 4, 1954

* * * * *

The plaintiff, United States of America, by its attorney J. Edward Lumbard, United States Attorney for the Southern District of New York, for its complaint herein alleges:

1. This is an action under Section 340(a) of the Immigration and Nationality Act, Public Law No. 414, 82d Congress, 2d Session

2. At all times hereinafter mentioned, the plaintiff was and now is a sovereign power.

3. Defendant resides at 1220 Commonwealth Avenue, Borough of Bronx, City, State and Southern District of New York, within the jurisdiction of this Court.

4. On or about September 28, 1942, defendant filed a petition for naturalization in the United States District Court for the Southern District of New York at New York, N.Y., and was admitted to citizenship by that Court on January 4, 1944, as Ettore Zucca, receiving Certificate of Naturalization No. 5588188.

5. In the proceedings which led to the defendant's naturalization, the defendant stated under oath, among other things, as follows:

[2] (a) On October 7, 1940, in connection with his registration as an alien pursuant to the Alien Registration Act of 1940, the defendant stated:

4

"10. I am, or have been within the past 5 years, or intend to be engaged in the following activities: In addition to other information, list memberships or activities in clubs, organizations or societies: *Business Agent & Organizer for Waiters & Waitresses Union, Local #1 A. F. L. from September 1937 to May 1939. I am now member of same. Also have been member of Metropole Sporting Club.*"

* * * * *

"15. Within the past 5 years I *have not* been affiliated with or active in (a member of, official of, a worker for) organizations devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government."

(b) On September 28, 1942, in his preliminary naturalization examination alleged: that he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government in this country, and that the only organization to which he belonged was the Waiters Union.

and that he had formerly belonged only to the Metropole Sporting Club.

(c) On September 28, 194-, in testifying before a naturalization examiner and in executing his petition for naturalization, alleged under oath:

"It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of which I am at this time a subject or citizen . . ."

"I am not; and have not been for the period of at least 10 years immediately preceding the date of this petition . . . a believer in the unlawful damage, injury, or destruction [3] of property, or sabotage; nor a disbeliever in or opposed to organized government, nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government . . . I am, and have been during all the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States."

6. That all of the aforesaid statements of the said defendant as set forth in paragraph 5 of this complaint were false and untrue as more particularly appears hereinafter.

7. That the said defendant was a member of the Communist Party of the United States, including the Workers Communist Party and other organizations affiliated with or controlled by the Communist Party of the United States from 1925 to 1947.

8. That the Communist Party of the United States was an organization which, during the period of said defendant's membership therein:

(a) Advised, advocated or taught the overthrow by force or violence of the government of the United States;

(b) Advised, advocated or taught the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers of the government of the United States because of his or their official character;

(c) Advised, advocated or taught the unlawful damage, injury or destruction of property;

(d) Advised, advocated or taught sabotage;

(e) Wrote, circulated, distributed, printed, published or displayed, or caused to be written, circulated, distributed, printed, published or displayed, or had in its possession for the purpose of circulation, distribution, publication, issuance or display, written and printed matter which advised, advocated or taught

the performance of the acts described in the subparagraphs immediately preceding and numbered a, b, c and d.

[4] (f) Promoted, influenced and advanced the political activities, public relations and public policy of the Union of Soviet Socialist Republics.

9. That at all of the times above mentioned the Communist Party of the United States was a section of the Communist Internationale, an international organization whose principal officers were citizens or subjects of foreign countries and the principal offices of which were situated in Moscow, in the Union of Soviet Socialist Republics; that decisions made by such organizations were binding upon other Communist Parties, including the Communist Party of the United States and the individual members thereof, whether such decisions were contrary to the laws of the United States or not.

7 10. That the naturalization of the said defendant was illegally procured in that his naturalization was prohibited by Section 305 of the Nationality Act of 1940, since he had been a member of the Communist Party within the period of 10 years immediately preceding the filing of his petition, such organization having engaged in activities proscribed by the statute.

11. That the naturalization of the defendant Ettore Zucca was procured by concealment of material facts in that:

(a) The defendant concealed the facts relating to his membership in the Communist Party and its affiliated organizations;

(b) The defendant did not disclose that he was not in a position to establish that he was a person of good moral character during the period required by law, having; among other things, made false statements under oath in his petition for naturalization as more specifically set forth hereinabove;

(c) The defendant was not attached to the principles of the Constitution of the United States of America and was not well disposed to the good order and happiness of the United States of America during [5] the period required by law inasmuch as he had been a member of the Communist Party of the United States of America and other organizations affiliated with such Communist Party, which organizations had, as the defendant well knew, engaged in activities in violation of the laws of, and detrimental to the interests of the United States of America, as more particularly set forth above; and

8 the defendant personally subscribed to, endorsed, advocated and participated in such activities;

(d) The defendant did not intend in good faith to support the Constitution of the United States, and he further did not

intend to renounce and abjure absolutely and entirely all allegiance and fidelity to all other foreign states and sovereignties, and to bear true faith and allegiance solely to the United States, but rather intended to, and did retain allegiance to the Communist Internationale and the Union of Soviet Socialist Republics.

12. The naturalization of the defendant Ettore Zucca was procured by wilful misrepresentations in that the said defendant at the time he applied and at the time he obtained naturalization:

(a) The defendant wilfully and intentionally made false statements that he was attached to the principles of the Constitution and well disposed to the good order and happiness of the United States during the period required by law, although he had been a member of and active in the affairs of the Communist Party of the United States of America and other organizations affiliated with such Communist Party which, to the defendant's knowledge, had engaged in activities in violation of the laws of, and detrimental to the interests of the United States of America, as more particularly set forth above; and the defendant personally subscribed to, endorsed, advocated and participated in such activities;

9 (b) The defendant wilfully and intentionally made false statements that he intended to support and defend the Constitution and laws of the United States and to bear true faith and allegiance to the United States of America;

(c) The defendant at the time he alleged, under oath, that he intended to renounce absolutely [6] and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, as more particularly set forth in paragraph 5 of this complaint, did not, in fact, so intend, but rather intended to retain allegiance and fidelity to the Communist Internationale and the Union of Soviet Socialist Republics.

13. That the said defendant deliberately and intentionally made false statements in the proceedings leading up to his naturalization, as set forth in the preceding paragraphs, in order to prevent the making of a full and proper investigation of his qualifications for citizenship; to conceal his lack of attachment to the principles of the Constitution; to induce the Immigration and Naturalization Service to make an unconditional recommendation to the court that his petition be granted; to preclude inquiry by the court concerning his qualifications for citizenship; and to procure naturalization in violation of law.

14. That good cause exists for the institution of this suit and the plaintiff is entitled to have the order of the court admitting the defendant to citizenship of the United States revoked and set aside, and to have the certificate of naturalization, previously issued to the defendant, cancelled on the grounds that such order and certificate of naturalization were procured illegally and by concealment of material facts and wilful representations.

WHEREFORE, the plaintiff demands judgment (a) revoking and setting aside the order admitting the defendant to citizenship; (b) cancelling his certificate of naturalization; (c) directing the defendant to surrender such certificate of naturalization to the Commissioner of [7] Immigration and Naturalization; (d) declaring that the defendant Ettore Zucca is not and never was a duly naturalized citizen of the United States and that he is not entitled to any of the rights and privileges of such citizenship; and (e) forever restraining the defendant from claiming any rights, privileges, benefits or advantages under such order or certificate.

Dated: New York, N.Y., April 29, 1954.

J. EDWARD LUMBARD,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff.

by George C. Mantzoros,
Assistant United States Attorney,
Office and Post Office Address,
United States Court House,
Foley Square,
New York 7, N.Y.

10a VERIFICATION OF COMPLAINT.

State of New York, County of New York, Southern District of New York, ss.:

GEORGE C. MANTZOROS, being duly sworn deposes and says that he is an Assistant United States Attorney for the Southern District of New York, and as such has charge of the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true; that the reason this verification is made by him and not by the plaintiff is that the plaintiff is a corporation sovereign; that the sources of

his information and the grounds of his belief are the records which are on file in his office.

GEORGE C. MANTZOROS,
Assistant United States Attorney

Sworn to before me this 29th day of April, 1954.

DANIEL TANNENBAUM
Notary Public, State of New York
Qualified in Kings County
No. 24-3930200
Commission Expires March 30, 1955

10b In United States District Court

[Title omitted]

SUMMONS—May 4, 1954

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to serve upon J. EDWARD LUMBARD, United States Attorney for the Southern District of New York, plaintiff's attorney, whose address is United States Court House, Foley Square, New York, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM V. CONNELL,
*Clerk of Court.*
JAMES E. VALECHE,
*Deputy Clerk.*

(Seal of the U. S. District Court)

Dated May 4, 1954

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.)

10c In United States District Court

[Title omitted]

AFFIDAVIT OF GEORGE C. MANTZOROS

State of New York,
County of New York,
Southern District of New York, ss.:

GEORGE C. MANTZOROS, being duly sworn, deposes and says as follows:

That he is one of the Assistant United States Attorneys on the staff of J. Edward Lumbard, United States Attorney for the Southern District of New York in charge of the above-entitled case.

That the only knowledge or information which he has in this case has been obtained through files turned over to him for use in preparation of the complaint.

That he has no personal knowledge of any of the facts herein and is not a prospective witness.

That on information and belief his superior, the said J. Edward Lumbard likewise has no personal knowledge of any of the facts herein and is not a prospective witness.

That he has carefully reviewed the files in this case and finds nothing therein which would indicate any special or unusual circumstances requiring the production of the documents requested by the defendant in his notice to take depositions, dated July 8, 1954.

10d That many of the documents in said files are privileged because of their confidential nature.

GEORGE C. MANTZOROS.

Sworn to before me this 22nd day of July, 1954.

CHARLES M. LEE
Charles M. Lee

Notary Public, State of New York

No. 03-228950
Qualified in Bronx County
Cert. Filed with Clerks of Bronx and N. Y. Counties and Register's

Term Expires March 30, 1955

11 In United States District Court

NOTICE OF MOTION TO DISMISS COMPLAINT OR TO MAKE MORE DEFINITE AND CERTAIN AND TO STRIKE CERTAIN ALLEGATIONS AS IRRELEVANT AND TO SEPARATELY STATE AND NUMBER

SIRS:

PLEASE TAKE NOTICE, that upon the complaint herein, the affidavit of verification thereof by George C. Mantzoros, sworn to April 29, 1954, the affidavit of George C. Mantzoros, sworn to July 22, 1954, and all proceedings had herein, the undersigned will move this Court at a stated term thereof for the hearing of motions to be held at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 24th day of August, 1954, at 10:00 o'clock in the forenoon thereof, or as soon thereafter as counsel may be heard, for an order

1. Dismissing the complaint:

(a) for failure to comply with Rule 8(a) and (c) of the Rules of Civil Procedure; and

(b) for failure to comply with Rule 9(b) of the Rules of Civil Procedure; and

(c) for failure to comply with Rule 10(b) of the Rules of Civil Procedures; and

(d) for failure to file or serve on the defendant an affidavit showing good cause for the institution of the present
12 proceedings as required by the Immigration and Nationality Act of 1952 (8 U. S. C. A., Sec. 1451);

or if the motion to dismiss the complaint shall not be granted,

2. Requiring the plaintiff, pursuant to Rule 12(e) of the Rules of Civil Procedure, to make a more definite statement [23] respecting

(a) the allegation in paragraph 6 of the complaint "that all of the aforesaid statements of said defendant as set forth in paragraph 5 of this complaint were false and untrue as more particularly appears hereinafter."

(b) the allegation in paragraph 7 of the complaint "that the said defendant was a member of the Communist Party in the United States, including the Workers Communist Party and other organizations affiliated with or controlled by the Communist Party of the United States from 1925 to 1947;"

(c) the allegation in paragraph 11(b) of the complaint that: "the defendant did not disclose that he was not in a position

to establish that he was a person of good moral character during the period required by law, having, among other things, made false statements under oath in his petition for naturalization as more specifically set forth hereinabove;"

13 (d) the allegation in paragraph 11(c) of the complaint that: "he has been a member of the Communist Party of the United States of America and other organizations affiliated with such Communist Party, which organizations had, as defendant well knew, engaged in activities in violation of the laws of, and detrimental to, the interests of the United States of America, as more particularly set forth above; and did personally subscribe to, endorsed, advocated and participated in such activities;"

(e) the allegation in paragraph 12(a) of the complaint that: "he had been a member of and active in the affairs of the Communist Party of the United States of America and other organizations affiliated with such Communist Party which, to the defendant's knowledge, had engaged in activities in violation of the laws of, and detrimental to, the interests of the United States of America, as more particularly set forth above; and the defendant personally subscribed to, endorsed, advocated and participated in such activities;" and

(f) the allegation in paragraph 13 of the complaint that: "the said defendant deliberately and intentionally made false statements in the proceedings leading up to naturalization as set forth in the preceding paragraphs";

14 [24] ● Striking out as immaterial and redundant, pursuant to Rule 12(f) of the Rules of Civil Procedure, so much of the allegations of paragraph 7 of the complaint as relates to a period prior to January 4, 1934, or subsequent to January 4, 1944;

4. Directing plaintiff, pursuant to Rule 10(b) of the Rules of Civil Procedure, to separately state and number the allegations in paragraph 11(c) and 12(a) of the complaint and the claims based upon alleged violation of the Immigration and Nationality Act of 1952, and the Nationality Act of 1940; and,

5. For such other and further relief as may be just and proper.

Dated: New York, N. Y.
August 9, 1954.

Yours, etc.

JUDD & GURFEIN
*Attorneys for Defendant*
By /s/ ORRIN G. JUDD
*A Member of the Firm*
*Office and P. O. Address*
*655 Madison Avenue*
*New York 21, N. Y.*

To: J. EDWARD LUMBARD,
*United States Attorney for the*
*Southern District of New York,*
*Attorney for Plaintiff,*
*United States Court House,*
*Foley Square,*
*New York, New York.*

15 In United States District Court

OPINION OF PALMIERI, D. J.

* * * *

APPEARANCES:

Hon. J. Edward Lumbard
United States Attorney for the
Southern District of New York
Attorney for United States

George C. Mantzoros, Esq.,
Assistant United States Attorney
of Counsel.

Judd & Gurfein, Esqs.
655 Madison Avenue
New York 21, N. Y.
Attorneys for Defendant,

Orrin Judd, Esq.,
of Counsel.

OPINION

PALMIERI, D. J.

The defendant was naturalized by this Court on January 4, 1944. The United States now brings this action under section 340(a) of the Immigration and Nationality Act of 1952, [32] 66 Stat. 163, 260, 8 U. S. C. § 1451(a) (1952 ed.), to revoke and set aside the order admitting the defendant to citizenship and to cancel the defendant's certificate of naturalization on the grounds that the defendant's naturalization was illegally procured and that the defendant concealed material facts and wilfully
16 misrepresented others in the course of the proceedings leading to his naturalization.

The defendant has moved that the complaint be dismissed because of (1) the Government's alleged failure to draft an adequate complaint and (2) the Government's failure to file an affidavit showing good cause for the institution of the instant proceeding.

The defendant argues that the Government's complaint is pro-

cedurally inadequate because it allegedly fails to comply with Rules 8(a), 8(c) (sic), 9(b), and 10(b) of the Rules of Civil Procedure. These Rules deal with the general rules of pleading, the particularity with which fraud should be pleaded, and the form of pleadings. Defendant asserts that the complaint fails to give fair notice of the Government's claim, but it is clear that this assertion is without merit. The complaint alleges that the defendant's naturalization was illegally procured in that it was prohibited by section 305 of the Nationality Act of 1940 and that the defendant concealed material facts and misrepresented others in the course of the proceedings leading to his naturalization. It sets forth the alleged act which made the procurement of [33] defendant's naturalization illegal and the allegedly concealed and misrepresented facts with what may well be unnecessary specificity for a civil complaint.

In view of this, it would appear that the defendant is merely saying that a better complaint should have been drawn. However, it is not the function of this court to pass on the artistic merits of pleadings. See *Dioguardi* v. *Durning*, 139 F. 2d 774 (2d Cir. 1944). The complaint not only gives the defendant fair notice of the Government's claim but it also informs him of the alleged facts upon which that claim is based. The motion to dismiss the com-
17 plaint because it is procedurally inadequate is therefore denied.

The defendant has also moved that the complaint be dismissed because of the Government's failure to file an affidavit showing good cause for the institution of this proceeding. He contends that the filing of such an affidavit is required by section 340(a), 8 U. S. C. § 1451(a) (1952 ed.), which reads:

> "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization. . . ."

Section 340(a) is derived from section 338(a) of the Nationality Act of 1940, 54 Stat. 1137, 1158 which was derived from section 15 of the Act of June 29, 1906, 34 Stat. 596, 601 (1906), the first enactment providing for denaturalization on [34] the grounds of fraud or illegal procurement. See S. Rept. No. 1137, 82d Cong., 2d Sess. 45 (1952); S. Rept. No. 1515, 81st Cong., 2d Sess. 755 (1950). The 1906 Act contained the language:

> "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . ."

to denaturalize a person on the grounds of fraud or illegal procurement; and the quoted language was incorporated into the 1940 and 1952 acts without Congressional comment.

The Government contends that the source of a United
18 States Attorney's power to institute civil denaturalization actions is the

> "duty of each United States attorney, within his district, to . . . prosecute . . . for the government, all civil actions, suits or proceedings in which the United States is concerned. . . ."

28 U. S. C. § 507(a)(2) (1952 ed.). The position taken by the Government is that United States Attorneys had the power to institute civil denaturalization actions before the passage of the Act of June 29, 1906, and that the 1906 Act and its later re-enactments did not circumscribe this power. See H. R. Doc. No. 46, App. D, 59th Cong., 1st Sess. 76, 78 (1905); *Bindczyck* v. *Finucane*, 342 U. S. 76, 79 n. 3 (1951); *United States* v. *Mansour*, 170 Fed. 671, 675 (S. D. N. Y. 1908); *United States* v. *Norsch*, 42 Fed. 417 (C. C. E. D. Mo. 1890). [35] The Government supports its position by showing that Congress was well aware that United States Attorneys were conducting civil denaturalization actions when it enacted the 1906 Act and did not indicate that it wished to curtail their power to do so. See H. R. Rept. No. 1789, 59th Cong., 1st Sess. 2 (1906); statement of Congressman Bonynge, manager of the bill, 40 Cong. Rec. 3640 (1906); statement of Congressman Hayes, 40 Cong. Rec. 7043 (1906). From this the Government concludes that in providing that

> "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor . . ."

to institute denaturalization proceedings, Congress merely imposed a requirement that United States Attorneys institute such proceedings whenever they were furnished with an affidavit of good cause. It did not intend, the argument runs, that a United
19 States Attorney should be powerless to institute proceedings if he had not been furnished with an affidavit.

Although it can be assumed that the civil denaturalization actions initiated by the Government prior to the passage of the Act of June 29, 1906 were valid, see *Johannessen* v. *United States*, 225 U. S. 227, 240 (1912); S. Rept. No. 1515, 81st Cong. 2d Sess. 754 (1950), I cannot agree with the Government's conclusions. The legislative history of the Act of June 29, 1906 indicates (1) that the procedure first outlined in section 15 of that Act, and now set forth in section 340 of the Immigration and Nationality Act of 1952, is

the [36] only procedure for denaturalizing a person on the grounds of fraud or illegal procurement, and (2) that this procedure requires that before a United States Attorney can institute a civil denaturalization action he must be furnished with an affidavit of good cause.

The Government's premise that the legislative history of the 1906 Act does not indicate that Congress intended to restrict the theretofore exercised power of United States Attorneys to institute civil denaturalization actions is, in my opinion, invalid. The Government apparently assumes that Congress intended the procedure which is set forth in section 15 of the 1906 Act to be an alternative to the procedure in use before the Act took effect. But section 15 and its legislative history furnish abundant evidence that Congress intended that the procedure set forth in that section should be followed whenever civil denaturalization actions were thereafter initiated.

In addition to referring to the affidavit of good cause section 15 provided that a defendant in a denaturalization proceeding should have 60 days personal notice in which to answer the complaint unless he was absent from the United States or from the district in which he had last resided. And, after the bill that later became the 1906 Act was introduced, Section 15 was amended to provide that a denaturalization action could only be instituted in a court in the judicial [37] district in which the naturalized citizen resided. See statement of Congressman Bonynge, manager of the bill, 40 Cong. Rec. 7874 (1906).

The fact that Congress inserted these requirements for the protection of naturalized citizens in the 1906 Act is inconsistent with the Government's position. It indicates that in enacting section 15 of that Act Congress did intend to limit the theretofore exercised power of United States Attorneys to institute civil denaturalization actions. For if, as the Government contends, the power of United States Attorneys to institute such actions is derived from 28 U. S. C. §507(a)(2) (1952 ed.), which empowers United States Attorneys to prosecute all civil actions in which the Government is concerned, and is not restricted by the provisions of section 340 of the Immigration and Nationality Act of 1952 (a reenactment of section 15 of the 1906 Act so far as is material to the decision of the instant motion), the provisions which safeguard naturalized citizens are effective only if United States Attorneys choose to give them effect by proceeding under section 340 instead of under their general power to prosecute all civil actions for the Government. An interpretation which gives such cavalier treatment to important safeguards insisted on by Congress cannot be sustained. I therefore conclude that the power of United States Attorneys to institute civil denaturalization actions is derived from [38] and limited by

the provisions of section 340 of the Immigration and Nationality Act of 1952. *Cf. Bindczyck* v. *Finucane*, 342 U. S. 76, 81-84 (1951); *Volpe* v. *Jordan*, 161 F. 2d 390, 395 (7th Cir. 1947).

This determination still leaves open the following questions:

(1) Whether section 340(a) requires that a United States Attorney be furnished with an affidavit of good cause before he can institute a denaturalization proceeding; and

(2) if such an affidavit is required, whether a United States Attorney must file it with the court when instituting a denaturalization proceeding.

In support of its contention that United States Attorneys may institute denaturalization proceedings even though they have not been furnished with affidavits of good cause the Government relies on cases which hold or contain dicta to the effect that a United States Attorney can "institute proceedings of this character sua sponte whenever he ha(s) reason to believe that the law ha(s) been violated . . ." *Schwinn* v. *United States*, 112 F. 2d 74, 75, 76 (9th Cir.), aff'd "on the sole ground that the certificate of citizenship was illegally procured," 311 U. S. 616 (1940); *United States* v. *Jerome*, 115 F. Supp. 818 (S. D. N. Y. 1953); [39] *United States* v. *Lustig*, 110 F. Supp. 806 (S. D. N. Y. 1953); *Cf. United States* v. *Tuteur*, 215 F. 2d 415 (7th Cir. 1954); *United States* v. *Knight*, 291 Fed. 129 (D. C. Mont. 1923); *United States* v. *Eeles*, 227 Fed. 189 (N. D. Cal. 1915).

To the extent that these cases are predicated upon the view that United States Attorneys possess the power to initiate civil denaturalization actions unfettered by the provisions of section 340, the preceding portion of this opinion shows why I cannot agree with them.

22 Moreover, it does not appear that any of the cases cited by the Government considered the legislative history of section 340 which has been referred to above, and only two referred to *Bindczyck* v. *Finucane*, 342 U.S. 76 (1951). One distinguished it on the ground that it dealt with denaturalization proceedings instituted in a state rather than a federal court. *See United States* v. *Jerome*, 115 F. Supp. 818 (S. D. N. Y. 1953). With deference, however, I believe that this distinction does not give sufficient weight to the reasoning of the *Bindczyck* case. In that case the Court said:

> "In the light of . . . (the legislative history of section 15 of the 1906 Act) we cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record,

Congress formulated a self- [40] contained, exclusive procedure. With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure, Congress insisted on the detailed, explicit provisions of §15. . . .

"Between them, these two sections, §11 and §15, provided a complete and exclusive framework for safeguarding citizenship against unqualified applicants. . . . [I]f citizenship was granted, it was to be proof against attacks for fraud or illegal procurement based on evidence outside the record, except through the proceedings prescribed in §15. The congressional scheme, providing carefully for the representation of the Government's interest before the grant of citizenship and a detailed, safeguarded procedure for attacking the decree on evidence of fraud outside the record, covers the whole ground. . . ." pp. 83-84.

23 I believe that the "self contained, exclusive procedure" must be followed in denaturalization proceedings instituted in federal courts as well as those instituted in state courts.

The other, *United States* v. *Lustig, supra*, considered itself bound by the Supreme Court's affirmance of the lower court's disposition of the *Schwinn* case, although it stated that "it would seem, the reasoning of the Court of Appeals in the *Schwinn* case has been repudiated" by the Supreme Court's reasoning in the *Bindczyck* case. See p. 808 n. 3. It has already been pointed out that the Supreme Court affirmed *Schwinn* v. *United States*, 112 F. 2d 74 (9th Cir. 1940), [41] "on the sole ground that the certificate of citizenship was illegally procured." See 311 U.S. 616 (1940). And examination of the briefs submitted to the Supreme Court indicates that the issue of the power of a United States Attorney to institute a civil denaturalization action when he has not been furnished with an affidavit of good cause, was not raised before that Court. Therefore, I cannot regard the Supreme Court's affirmance of the lower court's disposition of the *Schwinn* case as being dispositive of this issue.

Nor can I agree with the cases cited by the Government if they are interpreted as holding only that section 340(a) does not require that a United States Attorney be furnished with an affidavit of good cause before he can institute a denaturalization proceeding. This opinion has already shown that section 340(a) is derived from section 15 of the Act of June 29, 1906 and is similar to that section in all respects that are material to the decision of the instant motion. Section 15 of the 1906 Act was itself derived from section 34 of a proposed uniform naturalization law drafted by two members

of the Commission on Naturalization appointed by President
24 Theodore Roosevelt. It provided:

> "The United States shall have the power to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship on the [42] ground of fraud or on the ground that such certificate . . . was illegally issued . . ." H. R. Doc. No. 46, App. F, 59th Cong., 1st Sess. 106 (1906).

It will be noted that this draft did not mention an affidavit of good cause. But when the bill which later became the 1906 Act was reported out of committee the committee report said that an important feature of the bill was that

> "(p)ower is given to the United States, *upon affidavit of any credible person*, to institute proceedings to cancel any certificate of citizenship which may have been procured through fraud or otherwise illegally obtained."

See H. R. Rept. No. 1789, 59th Cong., 1st Sess. 5-6 (1906) (emphasis added); and statement of Congressman Bonynge, 40 Cong. Rec. 7874 (1906). Since it appears that Congress altered the draft provision to refer to an affidavit of good cause, it can be assumed that Congress considered the affidavit significant and intended to condition the power of the United States to institute denaturalization proceedings upon the furnishing of such an affidavit to a United States Attorney.

This view of the legislative history of section 15 of the 1906 Act is supported by a contemporaneous administrative interpretation of that section. In a letter dated March 26, 1907 the Attorney General of the United States advised the Secretary of
25 Commerce and Labor, who was then charged with the responsibility of administering the immigration and naturalization laws, as follows:

> "The Honorable
>
> The Secretary of Commerce and Labor.
>
> Sir:
>
> The Department has the honor to acknowledge receipt of your letter of March 18th in which you ask whether the filing of an affidavit is necessary to give a United States attorney authority to institute proceedings in any court for the cancellation of a naturalization certificate. It appears to the Department that this is the case. The object of the provision undoubtedly is to protect holders of certificates from annoyance and attorneys from unnecessary labor as the result of mere complaints by individuals unable to produce evidence and unwilling to assume

the responsibility therefor, as suggested in your letter; but it also seems clear to me that Congress has seen fit to prescribe the method by which this protection to those holding naturalization certificates is to be enforced.

I am, therefore, of opinion that before any United States attorney is authorized to institute proceedings for the cancellation of a naturalization certificate he should be furnished with a proper affidavit on which the proceedings may be based.

Respectfully,

CHARLES J. BONAPARTE,
*Attorney General.*"

26 See unpublished opinion Att'y Gen., March 26, 1907, National Archives; *Cohen* v. *United States*, 38 App. D. C. 123 (D. C. Cir. 1912); Van Dyne, A Treatise on the Law of Naturalization of the United States 138 (1907).

Because of the legislative history of the denaturalization provision and the weight to be given to a contemporaneous administrative interpretation of a statute by the officer charged with its enforcement, see *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378 (1931), I hold that before a United States Attorney may institute a denaturalization proceeding he must be furnished with an affidavit of good cause.

The final question for decision is whether a United States Attorney must file the affidavit of good cause that has been furnished to him with the court when instituting a denaturalization proceeding. I believe that he must do so. The instant proceeding is of the most serious import. "Denaturalization . . . may result in the loss 'of all that makes life worth living.'" See *Knauer* v. *United States*, 328 U. S. 654, 659 (1946). It is often a preliminary step to deportation with its attendant rending of the social and familial roots and ties that have become the life of the deportee. Indeed, the mere initiation of a denaturalization proceeding may have serious adverse consequences for the naturalized citizen.

Thus, there can be no doubt that Congress had good reason to surround denaturalization actions with the safeguards prescribed by section 15 of the 1906 Act and its re-enactments, one of which is the affidavit of good cause. But, the protection afforded by the requirement of an affidavit of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion before trial.

27 *Cohen* v. *United States*, 38 App. D. C. 123 (D. C. Cir. 1912); *United States* v. *Richmond*, 17 F. 2d 28 (3d Cir. 1927); *United States* v. *Salomon*, 231 Fed. 928 (5th Cir. 1916); unpublished opinion of Judge Ryan in *United States* v. *Candela*, Civil No. 93-308 (S. D. N. Y. October 14, 1954).

Since the absence of an affidavit of good cause in the instant case deprives the defendant of a protection which Congress has afforded him, the complaint is dismissed unless the Government files such an affidavit within 15 days. My decision makes it unnecessary for me to decide certain procedural questions posed by the defendant's alternative motions. However, I am prepared to deal with them should the future course of this action warrant it.

Settle order on notice.

November 16, 1954.

EDMUND L. PALMIERI,
U. S. D. J.

In United States District Court

ORDER OF DECEMBER 6, 1954

An action having been commenced by the United States under Section 340(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1451(a) by service on the defendant of a summons and verified complaint to revoke and set aside the order admitting the defendant to citizenship by naturalization on the grounds that the defendant's naturalization was illegally procured and the
28 defendant concealed material facts and wilfully misrepresented others in the course of the proceedings leading to his naturalization and the defendant having moved this Court by notice of motion dated August 9, 1954 for an order:—

1. Dismissing the complaint—

(a) for failure to comply with Rule 8(a) and (e) of the Rules of Civil Procedure; and

(b) for failure to comply with Rule 9(b) of the Rules of Civil Procedure; and

(c) for failure to comply with Rule 10(b) of the Rules of Civil Procedure; and

(d) for failure to file or serve on the defendant an affidavit showing good cause for the institution of the present proceedings as required by the Immigration and Nationality Act of 1952 (8 U. S. C. A. § 1451);

or if the said motion to dismiss the complaint were not granted;

2. Requiring the plaintiff, pursuant to Rule 12(e) of the Rules of Civil Procedure, to make a more definite statement respecting certain allegations in paragraphs 6, 7, 11(b), (c), 12(a) and 13 of the complaint, as set forth in said motion;

3. Striking out as immaterial and redundant, pursuant to Rule

12(f) of the Rules of Civil Procedure, so much of the allegations of paragraph 7 of the complaint as relates to a period prior to January 4, 1934, or subsequent to January 4, 1944;

29 4. Directing plaintiff, pursuant to Rule 10(b) of the Rules of Civil Procedure, to separately state and number the allegations in paragraphs 11(c) and 12(a) of the complaint and the claims based upon alleged violation of the Immigration and Nationality Act of 1952, and Nationality Act of 1940; and

5. For such other and further relief as may be just and proper.

And said motion having regularly come on to be heard before me on August 24, 1954, in the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, and the defendant having appeared by his attorneys, Judd & Gurfein, Esqs., Orrin G. Judd, Esq., of counsel, and plaintiff having appeared in opposition thereto by Hon. J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for the United States, George C. Mantzoros, Esq., Assistant United States Attorney, of counsel,

Now (on reading the summons and complaint and the affidavit of George C. Mantzoros, Assistant United States Attorney, sworn to April 29, 1954, verifying said complaint, defendant's Notice of Motion dated August 9, 1954, the affidavit of George C. Mantzoros, sworn to July 22, 1954, briefs filed on behalf of defendant in support of said motion and the briefs filed by plaintiff in opposition to said motion, and on all the proceedings and papers heretofore had and filed herein, and due deliberation having been had, and upon filing the decision of the Court, it is

ORDERED, that the motion to dismiss the complaint for failure of the United States to comply with Rules 8(a) and (e), 30 8(h), and 10(b) of the Rules of Civil Procedure, be and the same hereby is denied; and it is further

ORDERED, that the motion to dismiss the complaint for failure to file an affidavit showing good cause for the institution of the present proceedings as required by the Immigration and Nationality Act of 1952 be and the same hereby is granted, provided that if the United States files in the Office of the Clerk of this Court and serves on defendant's attorneys, within sixty days after the service of a copy of this Order with Notice of Entry, an affidavit of good cause, the complaint herein shall be reinstated and defendant shall have sixty days thereafter to answer said complaint, as so supplemented, or move with respect thereto; and it is further

ORDERED, that the motions described in paragraphs 2, 3 and 4 of the defendant's Notice of Motion, dated August 9, 1954, be and the same hereby are marked off the calendar subject to restoration on five days' notice, if the complaint be reinstated as aforesaid,

said motions to be referred to me for further consideration and action.

Dated: December 6, 1954.

(S.) EDMUND L. PALMIERI,
U. S. D. J.

31 United States District Court

Southern District of New York

NOTICE OF APPEAL FROM ORDER OF DECEMBER 6, 1954—Filed February 4, 1955

*Sirs:*

NOTICE is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the order of the United States District Court for the Southern District of New York entered in this action on December 6, 1954, providing that the motion to dismiss the complaint for failure to file an affidavit showing good cause for the institution of the present proceedings, as required by the Immigration and Nationality Act of 1952, be granted, provided that if the United States files in the office of the Clerk of the District Court and serves on defendant's attorneys, within sixty (60) days after service of a copy of this order
32 with notice of entry, an affidavit of good cause the complaint herein shall be reinstated and defendant shall have sixty (60) days thereafter to answer said complaint, as so supplemented, or more with respect thereto.

Dated: New York, N. Y., February 4, 1955.

Yours, etc.,

J. EDWARD LUMBARD,
United States Attorney for the
Southern District of New York.
Attorney for Plaintiff.
Office & P. O. Address.
United States Court House,
Foley Square, New York 7, N. Y.

33 In United States District Court

FINAL ORDER DISMISSING COMPLAINT—February 14, 1955

Upon the annexed affidavit of George C. Mantzoros, verified the 3rd day of February, 1955, wherein it appears that the Plaintiff has elected to appeal, and for that reason declines to file an affidavit of good cause, pursuant to the proviso contained in the intermediate Order of this Court, dated December 6, 1954, permitting the filing of an affidavit of good cause, it is hereby

ORDERED, that the complaint be and the same is hereby dismissed without prejudice to the Government's right to institute an action to denaturalize the defendant upon filing an affidavit of good cause.

Dated: New York, N. Y., February 14, 1955.

(S.) EDMUND L. PALMIERI,
U. S. D. J.

34 In United States District Court

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SETTLEMENT OF FINAL ORDER

State of New York,
County of New York,
Southern District of New York—ss.:

GEORGE C. MANTZOROS, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of J. Edward Lumbard, United States Attorney for the Southern District of New York, attorney for plaintiff in the above-entitled action, and I am assigned to and in charge of the prosecution of this action.

2. This affidavit is submitted in support of the Plaintiff's application to settle a final Order herein so that an appeal may be taken from the decision of this Court holding that the complaint herein is defective by reason of failure to file an affidavit showing good cause for the institution of the present proceedings.

3. It is noted that the Order of this Court, dated December 6, 1954, is intermediate in nature and dismisses the complaint provided that, if the United States files in the office of the Clerk of the District Court and serves on defendant's attorney, within

35 sixty (60) days after service of a copy of the Order with notice of entry and affidavit of good cause, the complaint herein shall be reinstated.

4. Your deponent has been advised by the Department of Justice that the Government has elected to appeal and for that reason only declines to file an affidavit of good cause as permitted by the intermediate Order of this Court.

For this reason, it is respectfully prayed that a final Order be entered herein dismissing the complaint without prejudice so that an appeal may be promptly taken and the issue herein resolved.

GEORGE C. MANTZOROS,
Assistant U. S. Attorney.

(Sworn to February 3, 1955.)

36 United States District Court

Southern District of New York

NOTICE OF APPEAL FROM ORDER OF FEBRUARY 17, 1955—Filed February 18, 1955

*Sirs:*

NOTICE IS HEREBY GIVEN, that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the United States District Court for the Southern District of New York entered in this action and dated February 14, 1955.

Dated: New York, New York, February 17, 1955.

Yours, etc.,

J. EDWARD LUMBARD,
United States Attorney for the
Southern District of New York,
Attorney for plaintiff,
Office & P. O. Address:
Foley Square,
New York 7, N. Y.

To:

JUDD & GURFEIN, Esqs.,
Attorneys for Defendant,
655 Madison Avenue,
New York 21, N. Y.

37 United States Court of Appeals for the Second Circuit

No. 290, October Term, 1954

Argued April 13, 1955

Docket No. 23521

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*v.*

ETTORE ZUCCA, also known as Mario Sarni, also known as Ettore Sarni Zucca, DEFENDANT-APPELLEE

OPINION—April 28, 1955

Before CLARK, Chief Judge, and FRANK and HASTIE, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, Judge.

Appeal by the United States of America from a final order dismissing a denaturalization action against Ettore Zucca on the defendant's motion for the reason that the requirement of an affidavit of good cause specified in § 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), is a mandatory prerequisite of the institution of the action and must accompany the complaint therein.

Alfred P. O'Hara, Asst. U. S. Atty., New York City (J. Edward Lumbard, U. S. Atty., George C. Mantzoros, Asst. U. S. Atty., and Lester Friedman, Atty., Immigration and Naturalization Service, New York City, on the brief), for plaintiff-appellant.

Orrin G. Judd, New York City (Goldstein, Judd & Gurfein, Morris A. Wirth, Earle K. Moore, and Irwin M. Rosenthal, New York City, on the brief), for defendant-appellee.

PER CURIAM.

Affirmed on the opinion of District Judge Palmieri, D.C.S.D.N.Y., 125 F. Supp. 551.

38 United States Court of Appeals for the Second Circuit

Present: Hon. Charles E. Clark, Chief Judge; Hon. Jerome N. Frank, Hon. William H. Hastie, Circuit Judges.

United States, plaintiff-appellant

*v.*

Ettore Zucca, etc., defendant-appellee

Judgment—April 28, 1955

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion of District Judge Palmieri, D.C.S.D.N.Y., 125 F. Supp. 551.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. Daniel Fusaro,
*Clerk.*

39 Clerk's certificate to foregoing transcript omitted in printing.

40 Supreme Court of the United States, October Term, 1955

No. 213

United States of America, petitioner

*vs.*

Ettore Zucca, also known as Mario Sarni, also known as Ettore Sarni Zucca

Order Allowing Certiorari—Filed October 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1955 365317 555